RECORD AND BRIEFS

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In the Supreme Court of the United States

CHARLES S. TURNER, CLIFTON E. YARBOROUGH, CHRISTOPHER D. TURNER, KELVIN D. SMITH, LEVY ROUSE, & TIMOTHY CATLETT,
PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE DISTRICT OF COLUMBIA COURT OF APPEALS

REPLY BRIEF FOR THE PETITIONERS

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The government does not dispute that the federal courts of appeals and state courts of last resort are split on the question whether post-trial information has any bearing on the materiality inquiry under *Brady* v. *Maryland*, 373 U.S. 83 (1963). That split is plainly implicated by this case, where post-trial information starkly reveals the materiality of the government's withholding of James McMillan's presence at the crime scene.

On the second question presented, the government attempts to defend the decision under review as presenting

only factual applications of settled law. Not so. The decision expressly holds that parties using withheld information to challenge how a crime occurred face a heightened materiality showing, in conflict with the Court's decision in *Kyles* v. *Whitley* that the standard for materiality is simply whether the withheld evidence "could reasonably be taken to put the whole case in * * * a different light." 514 U.S. 419, 435 (1995). And the court of appeals implicitly contradicts this Court's holdings through its unhinged speculation explaining away withheld evidence and its failure to consider the weakness of the government case at trial. It is vital that the Court address these errors because, as District of Columbia prisoners, petitioners lack access to most traditional avenues of *habeas* relief. *E.g.*, *Byrd* v. *Henderson*, 119 F.3d 34, 36-37 (D.C. Cir. 1997).

1. Far from disputing the existence of a conflict, the government divides the courts into *three* groups, rather than the two identified by petitioners. Br. in Opp. 18-19. Such confusion in the courts is a reason for granting the petition, not denying it, especially given that petitioners' *Brady* claims would be sustained under two of those three approaches, including the one endorsed by the government.

a. The government does not dispute that there is a stark division among the courts on whether post-trial information can be used to evaluate the materiality of evidence withheld prior to trial. The Supreme Court of Delaware and the Sixth Circuit categorically bar the consideration of post-trial information. See *Wright* v. *State*, 91 A.3d 972, 990 & n.61 (Del. 2014); *Apanovitch* v. *Bobby*, 648 F.3d 434, 437-38 (6th Cir. 2011). On the other side of the spectrum is the Supreme Court of Missouri, which the government acknowledges has articulated a standard under which post-trial information can be considered for any

purpose. Br. in Opp. 19-20 (citing *State ex rel. Griffin* v. *Denney*, 347 S.W.3d 73 (Mo. 2011), cert denied, 132 S. Ct. 1859 (2012) and *State ex rel. Woodworth* v. *Denney*, 396 S.W.3d 330 (Mo. 2013)); see also Former Prosecutors Amicus Br. 15-18.

The government contrasts the approach of *Griffin* and *Woodworth* with the Second Circuit's approach in *Leka* v. *Portuondo*, 257 F.3d 89 (2d Cir. 2001), claiming that court considered post-trial information in its *Brady* analysis, but only to show "how the trial would have unfolded if the government had disclosed known favorable information to the defense." Br. in Opp. 19. The government claims this approach "comports with *Brady*'s materiality inquiry." *Ibid.*

b. Having implicitly acknowledged a three-way conflict, the government hangs its opposition on the assertion that the court of appeals's decision is consistent with *Leka*, 257 F.3d 89. Br. in Opp. 18-19. That assertion is both irrelevant and incorrect.

i. It is irrelevant because under the standard applied by the Supreme Court of Missouri in *Griffin*, 347 S.W.3d 73, and *Woodworth*, 396 S.W.3d 330, petitioners would be entitled to relief under *Brady*. Based principally on the order of signals in *Griffin*, Br. in Opp. at 20 & n.8, the government claims that the Missouri cases turn on state *habeas* procedure. That claim would be a surprise to the State of Missouri, which, in *Griffin*, sought certiorari of the precise issue presented here. Pet. for Certiorari, *Denney* v. *Griffin*, No. 11-853, 2012 WL 73210 (Jan. 3, 2012), *denied* 132 S. Ct. 1859 (2012). Neither the State nor the respondent argued that the decision below turned on a unique feature of state procedure. See *ibid.*; Br. in Opp., *Denney* (Mar. 1, 2012). Nor could they have. *Griffin*, *Woodworth*, and *State ex rel. Engel* v. *Dormire*, 304 S.W.3d 120 (Mo. 2010), considered post-trial evidence in

applying the standards set by this Court as to whether a verdict is "worthy of confidence." *Woodworth*, 396 S.W.3d at 342 (quoting *Kyles*, 514 U.S. at 434); *Griffin*, 347 S.W.3d at 77 (citing *Kyles*); *Engel*, 304 S.W.3d at 129 (quoting *Kyles*).

The government does not dispute that, under the standard applied in Missouri, McMillan's 1992 sodomy murder would constitute part of "the totality of * * * evidence uncovered following the prior trial," and be considered for any inference it provides regarding the materiality of the withheld evidence. *Woodworth*, 396 S.W.3d at 345. Here, the 1992 murder, which occurred prior to the government's disclosure of McMillan's identity, is directly relevant to the materiality of the suppression of McMillan's suspicious behavior at the crime scene. It is obvious, powerful evidence of the materiality of the government's withholding of the identity of an alternative perpetrator that the alternative perpetrator beat another woman to death and sodomized her just blocks from where the victim in this case was beat to death and sodomized.

The conflict among the courts accordingly is triggered by this case. It is therefore irrelevant whether the decision under review is consistent with the Second Circuit's decision in *Leka*, 257 F.3d 89.

ii. The decision under review nevertheless does conflict with *Leka*, and that conflict further warrants this Court's review. The court of appeals, after holding that McMillan's 1992 murder of A.M. was not itself suppressed *Brady* evidence because it did not exist at the time of trial (which petitioners never contested), further held that "McMillan's murder of A.M. *likewise has no bearing* on the question of the materiality of any evidence that the government actually did withhold from the defense." Pet. App. 36a (emphasis added). The court's conclusion was

not limited to the particular facts of McMillan's 1992 murder. Instead, it reasoned, "*Brady* is the wrong framework" for any consideration of post-trial information and that such information could lead to relief only through "other procedures * * * subject to different standards." *Id.* 37a (citation omitted); see also Innocence Network Amicus Br. 18.

The decision under review therefore stands in stark contrast with the court's reasoning in *Leka*, of which the government approves, in which post-trial information was considered to evaluate how the original trial may have differed. 257 F.3d at 97, 106; Br. in Opp. 19; see Pet. 19-20. Contrary to the government's assertions, McMillan's 1992 murder serves that purpose in two ways.

First, the 1992 murder shows that evidence could have been developed that McMillan committed the murder without the participation of a large group, supporting the single-perpetrator theory and undermining the government's group-attack case. Pet. 19. The government makes the facile response that a large group was not "*necessary*" to murder Mrs. Fuller given her diminutive size. Br. in Opp. 18 (emphasis in original). That misses the point entirely; the government's theory has long been that the extent of Mrs. Fuller's injuries indicated a large-group attack. Br. in Opp. 3-4; Gov't C.A. Br. 59-61, 102-03. The fact that McMillan's 1992 murder and sodomy resulted in greater injuries to the victim undermines that inference, and shows that petitioners could have developed evidence that McMillan was capable of the attack on Mrs. Fuller by himself. Pet. App. 112a n.14.

Second, McMillan's 1992 sodomy of his murder victim suggests that defendants would have been able to develop evidence at trial of his proclivity for sodomy or sexual violence. Pet. 19. The government claims that is improper

speculation. Br. in Opp. 17-18. But it is no more speculative than the inference this Court drew in *Kyles*, where the Court evaluated suppressed statements by a government witness that the police should check the defendant's garbage, thus indicating that the witness may have planted evidence. 514 U.S. at 448. The Court recognized that post-trial testimony by the prosecutor that he could not recall ever searching a suspect's garbage "confirmed" the materiality of the withheld evidence. *Ibid.* That inference involved speculation, as the defense could not have called the prosecutor to testify and it is impossible to say whether the detectives on the case had similar experiences. See *California* v. *Greenwood*, 486 U.S. 35 (1988) (holding warrantless searches and seizures of garbage do not violate the Fourth Amendment).[1] That does not make the Court's inference impermissible; in the government's words, "some hypothesizing is inevitable." Br. in Opp. 25; see also Former Prosecutors Amicus Br. 16-18. Just as in *Kyles*, McMillan's 1992 murder confirms the "promising lines of inquiry" that defense counsel would have had both before and at trial had they known that McMillan was at the crime scene acting suspiciously. *Leka*, 257 F.3d at 106.

2. The decision under review not only deepens a split among the courts, it also flatly contradicts this Court's holdings regarding the *Brady* materiality standard. Petitioners identified three ways the decision under review did so; and the government's opposition does not undermine that analysis.

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[1] *Wood* v. *Bartholomew*, 516 U.S. 1 (1995), further supports the inferences petitioners draw from the 1992 murder. Pet. 20. What the Court rejected as speculation in *Wood* was an appellate court's musings on the possible uses trial counsel could have made of inadmissible evidence after that counsel testified that the evidence would not have affected his strategy. 516 U.S. at 7-8.

a. Earlier this year, the Court reiterated the principle that courts should not "emphasize[] reasons a juror might disregard new evidence while ignoring reasons she might not." *Wearry* v. *Cain*, 136 S. Ct. 1002, 1006-1007 (2016). That is precisely what the court did in this case. In one instance, it conjured a convoluted scenario where McMillan, a man who beat and robbed other middle-aged women in the neighborhood, innocently enters and exits the crime scene and carries away evidence of a brutal sodomy murder. Pet. 22-23; Pet. App. 50a-51a & n.81; see Former Prosecutors Amicus Br. 13-15.

In the other, it confronted Mr. Luchie's powerful evidence that he was in the alley at the coroner's estimated time of death, and heard groans coming from the garage but saw that the doors were closed. Pet. App. 50a. This last fact is especially important, because when Mr. Freeman found Mrs. Fuller's body, the door to the garage was open.[2] The natural inference from this evidence is that the one or two people responsible for Mrs. Fuller's death were in the garage committing the assault when Mr. Luchie was in the alley. Rather than explore the effect of that inference, the court instead came up with ways a jury may have disbelieved Mr. Luchie's disinterested recollection. *Ibid.*

The government endorses the court's hypothesizing; indeed, it even adds some hypothesizing of its own. Br. in Opp. 25-27 n.10. This Court has been clear, however, that it is inappropriate to gauge the probative value of with-

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[2] Mr. Freeman gave further exculpatory testimony. He testified that he did not see any large group cross the street to enter the alley, but had seen the man later identified as McMillan walking up and down the street throughout the day. Pet. App. 17a, 49a n.79.

held evidence by creating narratives through which "a juror might disregard new evidence." *Wearry*, 136 S. Ct. at 1007.

The government seeks to justify the court's speculation because of supposedly "overwhelming eyewitness testimony" of a large group attack. Br. in Opp. 26; *see id.* 28. Yet the government's eyewitnesses were so heavily impeached — even without the defense proposing any alternative explanation of the crime and without the additional impeachment evidence withheld by the government — that the jury still deliberated for a week, acquitted two defendants, and then deadlocked on two others for many more votes. See Pet. 24.

The purported eyewitness testimony is further undermined by the objective, crime-scene evidence. The government has no choice but to claim this evidence has minimal value. Br. in Opp. 29. But the undisputed scientific evidence was that Mrs. Fuller was more likely attacked by one or two assailants, rather than a large group. See Pet. 13. Indeed, the physical evidence contradicted the government's account of the core event in the murder — the sexual assault on Mrs. Fuller in which numerous people allegedly held her legs and arms. Br. in Opp. 4. That is impossible in the cramped corner of a small, trash-strewn garage, where science tells us the sexual assault occurred. Pet. 25; Pets. C.A. Br. 10-11. Moreover, because this objective evidence strongly suggests Mrs. Fuller was killed by one or two people, it further confirms the materiality of the withheld evidence regarding McMillan and Mr. Luchie's observations in the alley.

There is far more than a "reasonable likelihood [this withheld evidence] could have affected the judgment of the jury." *Wearry*, 136 S. Ct. at 1006 (citation omitted). The court of appeals was only able to reach a different

conclusion by improperly focusing on identifying "reason[s] a jury *could* have disbelieved" the withheld evidence. *Smith* v. *Cain*, 132 S. Ct. 627, 630 (2012).

b. The court of appeals's crediting of the government's eyewitnesses is also the source of its second error, as it artificially inflated the strength of the government's case in performing its materiality analysis. Pet. 23-25. The government therefore mistakes petitioners' contention, which is not that the court failed to undertake a cumulative analysis. Br. in Opp. 27-28. Rather, petitioners contend that the court of appeals failed to account properly for the "existing or potential evidentiary record." *Kyles*, 514 U.S. 439-440.

The government implicitly acknowledges that the court of appeals failed to consider that the case was a weak one, seeking to excuse that failure by asserting the case was strong. Br. in Opp. 28 & n.11. Again, the objective evidence — here, the jury's prolonged deliberations and split verdict — demonstrate the contrary. The government relies instead on the use of the word "overwhelming" in a footnote from the background summary by the appellate panel that heard most petitioners' direct appeal,[3] and statements by the trial prosecutor. As to the former, context makes plain that the appellate panel was merely explaining its summary overview of the 1985 trial, in which the group-attack theory was uncontested and which took place before the withheld evidence was discovered. See *Catlett* v. *United States*, 545 A.2d 1202, 1206 n.2 (D.C. 1988). As to the prosecutor, he acknowledged that the trial "easily could have gone the other way." C.A. App.

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[3] Charles Turner appealed his conviction separately. See *Turner* v. *United States*, Nos. 86-314 & 90-530, Mem. Op. & J. (D.C. Jan. 24, 1992). The government's contrary assertion is mistaken. See Br. in Opp. 6.

1758. His statements that the prosecution "ended up [having] a much stronger case" because "everything sort of fell [the government's] way" only underscore the limitations on defense strategy imposed by the government's suppression. *Ibid.*

c. Finally, and most fundamentally, the decision under review conflicts with this Court's standard that withheld evidence is material if it "could reasonably be taken to put the whole case in * * * a different light." *Kyles*, 514 U.S. at 435. By holding that it is "quite difficult" to show materiality when the withheld evidence challenges "the basic structure of how the crime occurred," Pet. App. 54a, the court of appeals turned this Court's standard on its head.

Evidence challenging the basic structure of the crime is the quintessential example of evidence most likely to put a trial in "a different light" because it would completely change the character of the trial. *Kyles*, 514 U.S. at 435. Petitioners have identified such evidence. The suppressed evidence would have introduced an entirely new alternative-perpetrator defense, centered on a suspect with a history of violence against women, that would have been bolstered by physical evidence and multiple unrelated accounts, including Mr. Luchie's and Mr. Freeman's. See Former Prosecutors Amicus Br. 11-13.

Again forgetting that the purported eyewitnesses were so heavily impeached at trial that the jury returned a split verdict after extended deliberations, see Pet. App. 45a-47a, 49a, the government emphasizes that petitioners' alternative-perpetrator defenses "do in fact conflict with '*virtually everything* that the government's eyewitnesses said about the crime.'" Br. in Opp. 22 (quoting Pet. App. 54a). Exactly right. The Court has found evidence material when it contradicted some of the prosecution case. See *Wearry*, 136 S. Ct. at 1010-1011 (Alito, J., dissenting)

(noting numerous unaffected inculpatory witnesses)); *Smith*, 132 S. Ct. 629-630 (noting unaffected inculpatory evidence); *Kyles*, 514 U.S. 435 n.8, 443 n.14, 451 (noting inculpatory eyewitness and physical evidence unaffected by withheld evidence); Pet. 26-28. The notion that evidence that contradicts all of the government's eyewitnesses should somehow be deemed less material is counterintuitive to say the least.

The government's final response is to identify a few extreme cases in which courts have held that evidence of an alternative perpetrator is not material. Br. in Opp. 23-24. In each case, however, the flimsy alternative-perpetrator theory contradicted objective evidence. Here, it is the government case that is incompatible with the objective evidence. In any event, to the extent that the cases reveal confusion among the lower courts regarding the materiality of alternative-perpetrator evidence, that is yet another reason to grant the petition, not reject it. See Innocence Network Amicus Br. at 12-17.

* * * * *

The government's brief in opposition underscores the confusion in the lower courts regarding how to apply *Brady*'s materiality standard when post-trial events shed light on the materiality of evidence at trial. In addition, the court of appeals departed from this Court's precedents regarding *Brady* materiality in numerous ways. Those errors are so pronounced that the Court may wish to consider the possibility of summary reversal.

In all events, the petition for a writ of certiorari should be granted.

Respectfully submitted.

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